St. John's Law Review

Volume 28
Number 1 *Volume 28, December 1953, Number 1*
Article 16

May 2013

Torts--Absolute Immunity for Defamation in Judicial Proceedings (Bradford v. Pette, 129 N.Y.L.J. 2021, col. 6 (Sup. Ct. June 16, 1953))

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An interesting consideration in the instant case is the theory upon which the plaintiff intends to prove a contract. He is suing as his child's administrator, for damages due to conscious pain and suffering prior to death, pursuant to Sections 119 and 120 of the New York Decedent Estate Law.[11] This right of action is that which the decedent would have possessed had not death intervened, and whatever damages are recovered form part of his estate.[12] The New York rule is that ". . . an implied warranty of . . . fitness for a particular purpose as against . . . a retailer does not inure to the benefit of a third party who is a stranger to the contract . . . ." [13] Likewise, since a parent is not presumed, unless so authorized, to act as agent for his child,[14] the basis upon which the deceased child's privity of contract with the defendant retailer will be established is not immediately apparent. However, in *Pearlman v. Garrod Shoe Co.*,[15] the court, after stating the rule above quoted, went on to indicate the possibility that under certain circumstances an exception to this general statement might exist.[16] It may well be that the facts in the instant case will constitute one of the situations the court there envisioned.

In conclusion, it is suggested that the decision under consideration might well have rested upon Section 48, subdivision 3 of the Civil Practice Act, rather than upon subdivision 1 of the same section. The same result would thus have been attained as to the instant case, but without the undesirable effect of nullifying the legislative effort to establish different limitation periods for property damage and personal injury actions.

TORTS — ABSOLUTE IMMUNITY FOR DEFAMATION IN JUDICIAL PROCEEDINGS.—Plaintiff sued to recover for damages suffered as a result of two allegedly defamatory statements included by Justice Pette in an opinion written by him [1] and subsequently published, as a mat-

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[11] N. Y. DEC. EST. LAW §§ 119, 120. An action for wrongful death pursuant to Section 130 was barred by that section's special two-year period of limitation.

[12] *See* Stutz v. Guardian Cab Corp., 273 App. Div. 4, 10, 74 N. Y. S. 2d 818, 824 (1st Dep't 1947); Matter of von Kauffmann, 167 Misc. 83, 84, 3 N. Y. S. 2d 486, 487 (Surr. Ct. 1938).

[13] Pearlman v. Garrod Shoe Co., 276 N. Y. 172, 176, 11 N. E. 2d 718, 719 (1937).

[14] Strawn v. O'Hara, 86 Ill. 53, 56 (1887); *see* Mott v. Scholes, 147 App. Div. 82, 85, 131 N. Y. Supp. 811, 814 (2d Dep't 1911); McDonald v. City of Spring Valley, 285 Ill. 52, 120 N. E. 476, 478 (1918); see 67 C. J. S. 795.

[15] See note 13 *supra*.

[16] *Id.* at 177, 11 N. E. 2d at 719; see Fagan, *Sales and Security Law*, 26 ST. JOHN'S L. REV. 72, 81 (1951).

[1] The statements were from an opinion written by a United States dis-

ter of course, in the New York Law Journal. By way of defense, Justice Pette claimed judicial privilege, asserting the judicial character and official authorization of the Law Journal. As a further defense, the defendant pleaded privilege under Section 337 of the New York Civil Practice Act, good faith and truth. Both sides moved for summary judgment and judgment on the pleadings. In granting the defendant's motion for summary judgment, the court *held* that both the judicial immunity and the privilege extended by Section 337 to persons publishing a full and fair report of a judicial or legislative proceeding were sufficient defenses to the present action. *Bradford v. Pette,* 129 N. Y. L. J. 2021, col. 6 (Sup. Ct. June 16, 1953).

A study of the law of defamation evinces a marked conflict between the right of an individual to the protection of his good reputation, and the interest of society in uninhibited discussion and communication. In this conflict, the latter principle of public policy often prevails, and an invasion of personal rights is permitted. Although even a malicious invasion of rights is accorded an absolute privilege in some circumstances,[2] the occasions on which any invasion is allowed are few in number and exceptional in character.

"You have not done your duty; you have disobeyed my commands: you are a sedious [sic], scandalous, corrupt, and perjured jury." [3] When these words were spoken by Justice Skinner in 1772, and a subsequent indictment against him was quashed, the principle of absolute immunity for defamation in judicial proceedings became firmly established.[4] This absolute immunity relieves a judge from civil liability [5] or criminal indictment [6] for any act done or omitted to be done by him while acting in his judicial capacity. Even acts which are in excess of jurisdiction and alleged to have been done maliciously and corruptly,[7] and without regard for falsity,[8] are encompassed by the privilege. Although a judgment may have proved erroneous, and its consequences injurious, a judge may not be held

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trict judge [Bradford v. Harding, 108 F. Supp. 338 (E. D. N. Y. 1952)], and from the uncontradicted affidavits of a police officer of the City of New York.

[2] *See* Bradley v. Fisher, 13 Wall. 335, 351 (U. S. 1871); Gans v. Callaghan, 135 Misc. 881, 882, 238 N. Y. Supp. 599, 600 (Sup. Ct.), *aff'd mem.,* 231 App. Div. 737, 245 N. Y. Supp. 744 (2d Dep't 1930).

[3] Rex v. Skinner, Lofft 54, 55, 98 Eng. Rep. 529 (K. B. 1772).

[4] It was in 1772 that Lord Mansfield reiterated the comprehensive rule, although many more cases of like import may be found in the Year Books. See Yates v. Lansing, 5 Johns. 282 (N. Y. 1810).

[5] Lange v. Benedict, 73 N. Y. 12 (1878); Karelas v. Baldwin, 237 App. Div. 265, 261 N. Y. Supp. 518 (2d Dep't 1932); Gans v. Callaghan, *supra* note 2; Yates v. Lansing, *supra* note 4; Houghton v. Humphries, 85 Wash. 50, 147 Pac. 641 (1915).

[6] *See* Yates v. Lansing, *supra* note 4 at 291; Ange v. State, 98 Fla. 538, 123 So. 916, 917 (1929).

[7] Bradley v. Fisher, 13 Wall. 335 (U. S. 1871); *see* Mundy v. McDonald, 216 Mich. 444, 185 N. W. 877, 880 (1921).

[8] See PROSSER, TORTS 823 (1941); RESTATEMENT, TORTS § 585 (1938).

responsible[9] if he acted in his official character, in the course of a judicial proceeding.[10] The remedy for *judicial* misconduct is not civil action, but censure or removal.[11]

A judge need not ascertain at his peril whether his statements are relevant to the case before the court.[12] The doctrine of absolute privilege in respect to the acts of a judge in his judicial capacity is not limited, as in the case of suitors and counsel, to matters that are pertinent and relevant.[13] The rule of absolute privilege must be such, for to secure a free and independent administration of justice, a judge must be free to act fearlessly and without regard to personal consequences.[14] Where a judge acts without jurisdiction, *i.e.*, where there is a complete absence of power and authority to try a case, and he is aware of it, his rulings are nullities and no immunity exists.[15] Developing concurrently with the privilege extended to judges, we find the same protection accorded to jurors[16] and to other participants in judicial proceedings,[17] limited, however, by the requirement that all their acts must be in the character of a participant and relevant to the cause.[18]

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[9] Sweeney v. O'Dwyer, 197 N. Y. 499, 90 N. E. 1129 (1910); Hammond v. Howell, 1 Mod. 184, 86 Eng. Rep. 816 (K. B. 1674); 2 Mod. 218, 86 Eng. Rep. 1035 (K. B. 1677).

[10] A judicial proceeding includes any trial or inquiry before a court of justice or any other tribunal lawfully exercising a judicial function. See Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COL. L. REV. 463, 484 (1909); *see* Karelas v. Baldwin, 237 App. Div. 265, 268, 261 N. Y. Supp. 518, 521 (2d Dep't 1932) (The doctrine has been applied to the court of a coroner and to a court martial which is not a court of record.); see Aylesworth v. St. John, 25 Hun 156 (N. Y. 1881) (proceedings before a justice of the peace).

[11] *See* Bradley v. Fisher, *supra* note 7 at 350; Karelas v. Baldwin, *supra* note 10 at 267, 261 N. Y. Supp. at 519; see RESTATEMENT, TORTS § 585 (1938).

[12] *See* Karelas v. Baldwin, *supra* note 10 at 267, 261 N. Y. Supp. at 520; Scott v. Stansfield, L. R. 3 Ex. 220, 223 (1868).

[13] *See* Marsh v. Ellsworth, 50 N. Y. 309 (1872); see Karelas v. Baldwin, *supra* note 10 at 266, 261 N. Y. Supp. at 519.

[14] *See* Valesh v. Prince, 94 Misc. 479, 481, 159 N. Y. Supp. 598, 599 (Sup. Ct. 1916), *aff'd mem.*, 177 App. Div. 891, 163 N. Y. Supp. 1133 (2d Dep't 1917), *aff'd mem.*, 224 N. Y. 613, 121 N. E. 985 (1918); Karelas v. Baldwin, *supra* note 10 at 268, 261 N. Y. Supp. at 521; Gans v. Callaghan, 135 Misc. 881, 882, 238 N. Y. Supp. 599, 600 (Sup. Ct.), *aff'd mem.*, 231 App. Div. 737, 245 N. Y. Supp. 744 (2d Dep't 1930).

[15] *See* Bradley v. Fisher, 13 Wall. 335, 351 (U. S. 1871). A reporter need not ascertain whether all jurisdictional requirements have been complied with, and his publisher is not liable for publishing a full and fair report. Lee v. Brooklyn Union Pub. Co., 209 N. Y. 245, 103 N. E. 155 (1913).

[16] *See* Yates v. Lansing, 5 Johns. 282, 292 (N. Y. 1810).

[17] See Youmans v. Smith, 153 N. Y. 214, 47 N. E. 265 (1897) (privilege of counsel); Moore v. Manufacturers' Nat. Bank of Troy, 123 N. Y. 420, 25 N. E. 1048 (1890) (privilege of party litigants—libellous matter contained in defendant's answer); White v. Carroll, 42 N. Y. 161 (1870) (privilege of witness).

[18] Moore v. Manufacturers' Nat. Bank of Troy, *supra* note 17; *see* Youmans

Although the immunity extended to the participants in a judicial proceeding was unquestioned at common law, an anomalous situation existed inasmuch as there was no correlative right to publish the report of the proceedings in the newspapers or elsewhere.[19] In New York in 1854, the right to publish a fair and true report of any judicial, legislative or other official public proceeding was unequivocally granted by statute.[20] Prior to the passage of this statute, a newspaper publishing *ex parte* proceedings containing defamatory material would not be protected.[21] Under the statute, however, protection was extended to a publisher in such a situation.[22]

The privilege created by the statute of 1854 was at first restricted to publications in newspapers,[23] and the requirement persisted that no actual malice exist.[24] The present statute, Section 337 of the New York Civil Practice Act, on the other hand, extends the privilege to all publications,[25] and there is no longer any *express* requirement of freedom from actual malice.[26]

The structure of judicial immunity, erected and reinforced over the years, was apparently shaken in the decision of *Murray v. Brancato*.[27] In that case, a judge of the Kings County Court was accused of composing deliberate, personal, malicious and vituperative statements concerning a well-known member of the bar of the State of New York, and setting forth these statements in two judicial opinions.[28] He caused these opinions to be sent to the New York Law Journal and the New York Supplement, with an accompanying letter specifically requesting their publication. So unusual was it for a judge, acting in his judicial capacity, to be held liable in a civil action for defamation, that Judge Brancato's sole defense was absolute privilege in the performance of a judicial act. However, no-

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v. Smith, *supra* note 17 at 219, 47 N. E. at 266; see White v. Carroll, *supra* note 17.

[19] See SEELMAN, LAW OF LIBEL AND SLANDER § 209 (1933).

[20] Laws of N. Y. 1854, c. 130, § 1.

[21] Stanley v. Webb, 4 Sand. 21 (N. Y. 1850).

[22] *See* Stuart v. Press Pub. Co., 83 App. Div. 467, 476, 82 N. Y. Supp. 401, 406-407 (1st Dep't 1903); Salisbury v. Union & Advertiser Co., 45 Hun 120, 123 (N. Y. 1887).

[23] Laws of N. Y. 1854, c. 130, § 1; N. Y. CODE CIV. PROC. § 1907 (1916).

[24] *Ibid.*

[25] Laws of N. Y. 1940, c. 561, § 1 (privilege accorded to ". . . any person, firm or corporation. . . ."). This statute is also incorporated in N. Y. PENAL LAW § 1345. See also, DRAFTSMAN'S NOTE TO PENAL LAW § 1345 of MCKINNEY'S CONSOLIDATED LAWS ANNOTATED.

[26] Laws of N. Y. 1930, c. 619, § 1 (deleted the words "without proving actual malice").

[27] 290 N. Y. 52, 48 N. E. 2d 257 (1943).

[28] The first allegedly libellous opinion charged that plaintiff had attempted to win delay of a trial in order to have the case come before a judge of plaintiff's choice. The second allegedly libellous opinion implied that plaintiff had not acted in good faith in the matter.

where in the opinion is an attempt made to prove that he was performing a *judicial act,* because it is never intimated that the New York Law Journal and the New York Supplement are anything but unofficial publications.

The case arose on an application for judgment on the pleadings,[29] an extremely limited type of procedural motion where usually no affidavits may be considered or submitted.[30] The judgment is based solely on the pleadings, admissions,[31] bills of particulars and formal stipulations.[32] In the narrow confines of such a proceeding, with only the prescribed information before them, the court in the *Murray* case proceeded to shake the stronghold of judicial immunity and to re-define its boundaries. The majority of the court refused to grant the defendant's motion for judgment on the pleadings, and found that the allegations were sufficient to constitute a cause of action. In so doing, the court stated that the law imposes no duty upon a judge to publish opinions in unofficial reports, and when a judge sends opinions to the New York Law Journal and the New York Supplement he is not performing a judicial act, and thus he may be held liable as would any private person.[33] Refusing to consider the actions of the defendant in forwarding the opinions to the New York Law Journal and the New York Supplement as official acts, the court rationalized that to do so might sanction deliberate publications of malicious and injurious matters in law reviews, popular magazines or the daily press. The court opined that no imperative public policy pointed to an extension of the immunity from liability into such neighboring fields.

Although the *Murray* case was a startling aberration in the field of judicial immunity, does it represent a true threat to that principle? An examination of all the circumstances of that case leads us to reach a negative conclusion. The court was necessarily restricted by the paucity of information before it, and by the fact that only the single defense of absolute privilege was interposed. Judge Finch, in a most forceful and logical dissent,[34] pointed out the shortcomings of the *Murray* case. The defendant there neglected to plead, and the court consequently refused to apply, Section 337 of the New York Civil Practice Act although it conjectured as to whether this section would protect a judge who publishes his own opinion. The defendant did not attempt to prove the judicial character of his act although he may have shown the judicial purposes served by the New

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[29] N. Y. R. Civ. Prac. 112.
[30] See Prashker, New York Practice 379 (2d ed. 1951).
[31] N. Y. Civ. Prac. Act § 476.
[32] *See* Lefler v. Clark, 247 App. Div. 402, 404, 287 N. Y. Supp. 476, 479 (1st Dep't 1936).
[33] Murray v. Brancato, 290 N. Y. 52, 48 N. E. 2d 257 (1943).
[34] In which Judge Lewis and Judge Conway concurred.

York Law Journal[35] and the New York Supplement.[36]

The present case is thoroughly distinguishable from *Murray v. Brancato*. Whereas the dearth of information in the *Murray* case hampered the court's decision and forced it to leave unanswered many interesting questions, such was not the case in *Bradford v. Pette*. There the comprehensiveness of the decision was made possible by the nature of the proceeding—a motion for summary judgment.[37] In such an inclusive setting,[38] the court was able to supply the answers to the questions left open in *Murray v. Brancato*. Whereas Judge Brancato pleaded only judicial immunity, Justice Pette overlooked no possible defense. He asserted his judicial privilege and denied that he was engaged in anything other than an official judicial act. He repudiated any affirmative action on his part in causing the publication of the opinion, for, having composed and written the opinion, he delivered it to the clerk for filing in accordance with Rule 72 of the Rules of Civil Procedure[39] and from that point had nothing more to do with it. Its subsequent publication in the New York Law Journal was pursuant to a contract authorized by the Judiciary Law, and entered into between the publisher and the Justices of the Appellate Division in the Second Judicial Department.[40] The mere filing of Justice Pette's opinion with the county clerk was not the proximate cause[41] of any injury which might have been sustained as the result of its subsequent publication by the New York Law Journal.[42] In

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[35] *See* Murray v. Brancato, *supra* note 33 at 60, 48 N. E. 2d at 260 (dissenting opinion) (The New York Law Journal has been designated as the official newspaper of the First Judicial Department for the publication of calendars and official notices.).

[36] *Id.* at 63, 48 N. E. 2d at 262 (dissenting opinion).

[37] N. Y. R. CIV. PRAC. 113. Both sides moved for summary judgment.

[38] Defendant had included a variety of exhibits and affidavits which could not have been included in a motion for judgment on the pleadings. Some of these exhibits consisted of: a copy of the opinion written by the district court judge; a copy of the allegedly libellous opinion which had appeared in the Law Journal; a copy of the affidavit of the arresting officer; a copy of the complaint and warrant of arrest of plaintiff; a copy of the police blotter report showing the arrest of plaintiff; and a copy of the police report showing disposition of the case, and additional exhibits and affidavits.

[39] "When an opinion . . . is delivered at or before the order is filed, it shall be filed with the order. . . . Such opinion shall be a part of the record on which the order is made."

[40] "The justices of the appellate division in the second department . . . are hereby authorized to contract . . . for the payment to the owner of the daily law journal . . . for publishing calendars, decisions, opinions . . . and other similar matters relating to the courts in the second and tenth judicial districts. . . ." N. Y. JUDICIARY LAW § 91(2).

[41] Defamatory statements made in the presence of, and with the intention that they be published by, third parties, in the absence of any affirmative acts, are not the proximate cause of an injury sustained by the subsequent publication. Schoepflin v. Coffey, 162 N. Y. 12, 56 N. E. 502 (1900); Lewis v. Chemical Foundation, Inc., 233 App. Div. 287, 251 N. Y. Supp. 296 (4th Dep't 1931).

[42] When defendant ascended the bench, there was in practice an estab-

the *Bradford* case, Section 337 was affirmatively pleaded. In its amended state, the statute has been construed so as to apply to anyone publishing a fair and true report. To deprive a person of this statutory privilege merely because he is the judge who rendered the opinion would be an illogical interpretation of the statute.

Justice Pette did not neglect to plead good faith, and his good faith and proper motives cannot be doubted.[43] His were no intemperate comments concerning the person of the plaintiff, but objective statements obtained from records of the former proceedings in which the plaintiff was involved. With the abundance of evidence before it, the court could hardly do other than grant defendant's motion for summary judgment and deny plaintiff's motion.

Whether or not the case of *Bradford v. Pette* gives expression to the law of this state, and whether the case of *Murray v. Brancato* will be relegated to the archives as one of the many cases to be "limited to its facts," are questions which must be left to a decision on appeal. Suffice it to say that the thoroughness and scope of Justice Hill's decision in the *Pette* case will constitute a landmark in the field of judicial immunity.

It is unlikely today that a case similar to the *Murray* case in its facts would be decided by the Court of Appeals in the same manner if the defenses pleaded in the *Bradford* case were set forth. Section 337 alone would appear to be a complete defense to anyone publishing a fair and true report of a legislative or judicial proceeding.[44] If, however, Section 337 would have been a complete defense, it is difficult to understand why the majority of the court in the *Murray* case specifically stated that ". . . the publication of judicial and legislative proceedings in unofficial reports is privileged *only if made in good faith and from proper motives.*" [45] It would seem that the court harbored a doubt as to whether the deletion of the words "without actual malice" from the statute in 1930 was intended to change the common-law rule of liability where actual malice could be proved.[46] Although it would appear from the plain import

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lished routine whereby decisions and opinions were prepared for prompt publication in the N. Y. Law Journal. An employe of the N. Y. Law Journal called for the allegedly libellous opinion in accordance with a daily custom and practice. In *Murray v. Brancato,* the opinions were sent by the judge with a letter specifically requesting their publication.

[43] Where the immunity accorded to judges and legislators is inapplicable, and where the immunity conferred upon publishers of fair and true reports of official judicial proceedings cannot be asserted, publication of such proceedings in unofficial reports may nevertheless be privileged if made in good faith and from proper motives. *See* Murray v. Brancato, 290 N. Y. 52, 58, 48 N. E. 2d 257, 259 (1943).

[44] *See* Farrell v. N. Y. Evening Post, Inc., 167 Misc. 412, 415, 3 N. Y. S. 2d 1018, 1021 (Sup. Ct. 1938).

[45] Murray v. Brancato, *supra* note 43 at 58, 48 N. E. 2d at 259 (emphasis added).

[46] *Id.* at 59, 48 N. E. 2d at 260.

of the language used that Section 337 was intended to protect the publication of *all* fair and true reports whether published maliciously or not, it is submitted that such an intendment is contrary to all principles of justice and decency, and should not be attributed to the legislature. Such an interpretation would make it possible for a malevolent judge to include harsh, sarcastic, and irrelevant defamatory matter in a judicial opinion and forward copies to the daily press and periodicals of general circulation. However true it may be that the public is entitled to know all matters of public interest, the position that a statute could be intended to protect startling vituperation and railing denunciation is untenable. Censure or removal of a judge would appear to be inadequate for conduct so malicious, resulting in great harm to individual reputation.

Although the *Pette* case decides that Section 337 would protect a judge who affirmatively acts to publish his own opinions, it is submitted that with regard to strictly unofficial publications, the requirement of freedom from actual malice should attach.

With such a qualification, the *Pette* case is undoubtedly correct in according the protection of Section 337 to a judge in the same manner as to any other individual. To further clarify the issue, it is suggested that the New York Law Journal and the New York Supplement be accorded the judicial status which they so justly deserve. It cannot be doubted that they both form a constituent part of the judicial process, being cited by attorneys and judges and circulating valuable legal information to members of the legal profession.

TORTS — LAST CLEAR CHANCE — DEGREE OF KNOWLEDGE REQUIRED.—Deceased, having negligently entered a subway tunnel, was struck by a train of the defendant six hundred feet from the nearest station. The train was stopped three times by the release of an emergency brake before an investigation was conducted which revealed the body. One of several ways that this brake could be actuated was by a mechanism, suspended before each car, striking an object on the tracks. The Court of Appeals, in granting a new trial, *held* that the doctrine of last clear chance was applicable since defendant had knowledge of facts from which he could have deduced possible danger, and yet failed to take appropriate action. *Kumkumian v. City of New York*, 305 N. Y. 167, 111 N. E. 2d 865 (1953).

Under the doctrine of last clear chance an injured plaintiff, although his contributory negligence placed him in a position of peril,[1]

[1] *See* Mast v. Illinois Cent. R. R., 79 F. Supp. 149, 160 (N. D. Iowa 1948), *aff'd*, 176 F. 2d 157 (8th Cir. 1949); Lee v. Pennsylvania R. R., 269 N. Y.